No. 06-309

In The
Supreme Court of the United States

STATE OF FLORIDA,

Petitioner,

vs.

JAMES RABB,

Respondent.

On Petition For Writ Of Certiorari To The Fourth District Court Of Appeal Of The State Of Florida

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the use of a police dog to sniff for illegal drugs at the front entrance of a private residence violate the owner's reasonable expectation of privacy, as guaranteed by the Fourth Amendment of the United States Constitution?

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STATEMENT OF CASE

PROCEDURAL HISTORY

On May 20, 2002 the Respondent, James Rabb, was charged by criminal information for possession of controlled substances – including cannabis. The charges were the result of the issuance and execution of a search warrant of his home located at 2839 Polk Street, Hollywood, Florida. The search and seizure was conducted by detectives from the Broward County Sheriff's Office. The warrant was obtained, in large part, as the result of a dog-sniff alert at the front door of his residence.

The Respondent filed a Motion to Suppress in the Circuit (trial) Court, contending that a police dog sniffing at his front door was a "search" requiring a warrant, and absent a warrant the "search" was illegal. The trial court entered an Order granting the Motion to Suppress, finding that a "sniff" at his front door was an "illegal search" requiring a warrant, and that absent that illegally obtained information there was a lack of independent, legally obtained information to support probable cause. The State appealed.

The Florida Fourth District Court of Appeal affirmed the granting of the Motion to Suppress. *See*, *State v. Rabb*, 881 So.2d 587 (Fla. 4th DCA 2004), with Gross, J., dissenting. The Petitioner's motions for rehearing, rehearing *en banc*, and certification of question of great public importance were denied.

The State petitioned this Court for certiorari review. This Court vacated the District Court's decision and remanded the case for reconsideration in light of *Illinois v.*

Caballes, 543 U.S. 405, 125 S.Ct. 834 (2005); *Florida v. Rabb*, 544 U.S. 1028, 125 S.Ct. 2246 (2005).

On remand, the Fourth District Court of Appeal once again affirmed the granting of the Motion to Suppress. The State then petitioned for rehearing *en banc* and certification of a question of great public importance. The District Court denied the Motion for Rehearing *en banc* and certification, and issued a revised opinion. This now third opinion from the District Court appears as *State v. Rabb*, 920 So.2d 1175 (Fla. 4th DCA 2006). (A.[1] 47-100)

The State then sought leave to invoke the discretionary jurisdiction of the Florida Supreme Court. The Florida Supreme Court declined to hear the case. The Petitioner, State of Florida, now seeks certiorari review before this Court.

STATEMENT OF FACTS

The trial court conducted an evidentiary hearing on the Respondent's Motion to Suppress and made the following findings:

> "On April 23, 2002 Detective Taranu and another detective received information from an anonymous tipster that Defendant was growing marijuana in his home. The tipster gave Defendant's name, year of birth, and stated that he is a white male. The tipster then provided that Defendant's house was located on Polk Street behind the Howard Johnson's.

[1] **A.** = Petitioner's Appendix

> "The detectives located information at the property appraiser's office and went to the address of 2839 Polk Street, in Hollywood, Florida. The officers surveilled the house for about thirty minutes. Defendant exited the house and got into a Firebird that had been parked in the front of the residence. The detectives followed the car and made a traffic stop.
>
> "During the stop, a search of the car was conducted and a small amount of marijuana was located in the car and in Defendant's sock. Defendant also had some books and a videotape of marijuana cultivation in the car.
>
> "Based upon this search, Detective Taranu and his drug detector dog ('Chevy') went to Defendant's residence. Taranu took Chevy to the front door of the residence where the dog alerted. Based upon this conduct, Taranu obtained a search warrant."

In executing the search warrant, law enforcement officers entered the Respondent's home and discovered a cannabis grow operation and sixty-four (64) marijuana plants. Additionally, a safe was discovered which contained a small amount of pills.

The trial court found that Detective Taranu's use of his dog, Chevy, to sniff into Respondent's home amounted to an illegal search. The trial court then examined the other available information contained in the search warrant and determined that, absent the positive dog sniff, there was a lack of probable cause for issuing the warrant. The use of Chevy, the police dog, thus became dispositive in granting the Motion to Suppress.

REASON FOR DENYING WRIT

BECAUSE THE POLICE USED A DOG TO SNIFF INTO A PRIVATE RESIDENCE, THE DISTRICT COURT CORRECTLY SET THIS CASE APART FROM *UNITED STATES V. PLACE*, 462 U.S. 109, 104 S.CT. 1652 (1984) (occurrence at an airport); *ILLINOIS V. CABALLES*, *SUPRA*, AUTOMOBILE ON PUBLIC HIGHWAY, AND *UNITED STATES V. JACOBSEN*, 466 U.S. 109, 104 S.CT. 1652 (1984) (wayland package), AND FOUND A LEGITIMATE EXPECTATION OF PRIVACY CONSISTENT WITH LONG-STANDING PRECEDENT FOUND IN SUCH CASES AS *SILVERMAN V. UNITED STATES*, 365 U.S. 505, 81, S.CT. 679 (1961) AND *PAYTON V. NEW YORK,* 455 U.S. 573, 100 S.CT. 1371 (1980).

Once again, on remand, the Fourth District Court of Appeal had no difficulty in distinguishing between the use of trained police dogs to sniff baggage at an airport (*United States v. Place*, *supra*) or an automobile (*Illinois v. Caballes, supra),* and the use of police dogs to sniff into a private residence. In doing so, the District Court of Appeal referred to the long-standing proposition that one's home is given extraordinary protection under the Fourth Amendment, citing such cases as *Silverman v. United States*, *supra; Payton v. New York*, *supra*; and *United States v. United States District Court*, 407 U.S. 297, 313, 92 S.Ct. 2125 (1972). The District Court of Appeal reasoned that:

> "Given the shroud of protection wrapped around a house by the Fourth Amendment, we conclude that *Kyllo v. United States,* 533 U.S. 27 (2001), controls the outcome of the case at bar." *Rabb, supra* at 591. (A-58)

Thus, contrary to the Petitioner's argument, *United States v. Place*, *supra*, and *United States v. Jacobsen*, *supra*, are not at odds with the District Court's decision, which is grounded in the more recent decision of *Kyllo v. United States*, 533 U.S. 27, 121 S.Ct. 2038 (2001).

Kyllo v. United States, supra, gave the District Court the rationale for its decision for finding that a protected "search" occurred. The District Court quoted the following from *Kyllo*, which focused on the sanctity of the home:

> "The Fourth Amendment's protection of the home has never been tied to measurement of the quality or quantity of information obtained. In *Silverman*, for example, we made clear that any physical invasion of the structure of the home, 'by even a fraction of an inch', was too much, and there is certainly no exception to the warrant requirement for the officer who barely cracks open the front door and sees nothing but the non-intimate rug on the vestibule floor. In the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes. *Kyllo*, *Id.* at 35-36." *Rabb, supra*, at 592. (A-60)

In finding the sniff by the police dog, "Chevy", at the Respondent's home to be a "search", the District Court (as well as the trial court) also relied on *United States v. Thomas*, 757 F.2d 1359, 1366-67 (2nd Cir. 1985). There, a sniff dog was used at an apartment house. The Second Circuit held that the occupant had a legitimate expectation of privacy – even from a sniffing dog. The Petitioner herein seeks to find conflict between *Thomas* and other cases, such as *United States v. Lingenfelter*, 997 F.2d 632, 638 (9th Cir. 1993) (sniff of commercial warehouse from outside was not a search); *United States v. Reed*, 141 F.3d 644, 650 (6th Cir.

1998) (canine team was already lawfully inside apartment by consent, and "sniff" was not further search); and *United States v. Colyer*, 878 F.2d 469, 475-76 (D.C. Cir. 1989) (sniff of railroad "sleeper" compartment by dog in public corridor was not a search). However, in none of these cases did the court have the benefit of the *Kyllo* decision regarding the use of "sense enhancing" technology outside a private residence. None of these cases concern dog sniffs of an entrance to a private residence.

In finding that a warrantless search did occur, the District Court distinguished *United States v. Place*, *supra*, noting that "*Place* is no less a key in the case at bar". (*Rabb, supra*, at 592.)(A-61) It was of enormous difference to the District Court, and the deciding factor that in *Place*, the encounter occurred in a public airport, and not at their home.

United States v. Jacobsen, *supra*, (a case not mentioned in the majority decision, but championed by the Petitioner), is also not directly at odds with the District Court's decision. *Jacobsen* involved the testing of a suspicious white powder – which was waylaid at a Federal Express facility. A package was damaged, and a white powder spewed forth. Agents of the D.E.A. were called in, and they field-tested the substance for the presence of cocaine. The issue before the court was whether or not the field test was an unlawful "search" and "seizure" within the meaning of the Fourth Amendment.

In *Jacobsen*, the court emphasized that the contraband had initially been seized by non-governmental personnel, and the D.E.A.'s sole involvement was to field test the white powder. The field test was not a "search", as society was not prepared to recognize as "reasonable" a field test of an already seized white powdery substance.

The chemical test did not invoke a privacy interest which was entitled to Fourth Amendment protection. In this case, the privacy interest in one's home does invoke a privacy interest which has been recognized since the founding of the Republic.

The State's reliance on *City of Indianapolis v. Edmond*, 531 U.S. 32, 121 S.Ct. 447 (2000) is curious. There, the City had set up a series of vehicle checkpoints, with the ostensible purpose of ferreting out illegal drugs. In addition to visual observations, K-9 units were employed. The court found these roadblocks to be indistinguishable from the "general interest" in crime control and, thus, violated the Fourth Amendment. As the dissent point out, however, "the State's use of a drug-sniffing dog, according to the court's holding, annuls what is otherwise plainly constitutional under our Fourth Amendment jurisprudence. . . .", 531 U.S. at 48, Rehnquist, C.J., *dissenting*. If the use of drug-sniffing dogs was sufficient to infect an otherwise lawful vehicle stop into an unreasonable one under the Fourth Amendment, then obviously the use of such dogs compromised the occupant's legitimate expectation of privacy.

The most recent decision of *Illinois v. Caballes*, *supra*, is also *not* in direct conflict with the District Court. *Caballes* upheld the use of police sniff dogs during an otherwise valid vehicle stop. While a dog sniffing the trunk of a vehicle lawfully stopped on the roadway "does not rise to the level of a constitutionally cognizable infringement" (*Caballes, supra*), the same should not be said of a dog sniffing at one's front door. Vehicles are subject to special Fourth Amendment rulings. For decades, this Court has acknowledged the special latitude that is given to the police effecting searches and seizures involving motor

vehicles and their occupants. *See*, *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280 (1925); *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975 (1970); *California v. Acevedo*, 500 U.S. 565, 111 S.Ct. 1982 (1991); and *Thornton v. United States*, 541 U.S. 615, 124 S.Ct. 2127 (2004).

One's expectation of privacy in an automobile on the highway is significantly different from the traditional expectation of privacy and freedom in one's residence. *See*, *United States v. Martinez-Fuerte*, 428 U.S. 543, 561, 96 S.Ct. 3074 (1976). This is because "[a]utomobiles, unlike homes, are subjected to pervasive and continuing governmental regulations and controls". *South Dakota v. Opperman*, 428 U.S. 364, 368, 96 S.Ct. 3092 (1976). *See, also, Cardwell v. Lewis*, 417 U.S. 583, 590, 94 S.Ct. 2464 (1974). The relaxed Constitutional protections involving motor vehicles stand in stark contrast to the heightened protections afforded to one's dwelling place.

The District Court did not find *Caballes* in conflict with its holding because of the "significant place and situation differences", and stated:

> The challenged dog sniff occurred at the exterior of Rabb's house, the most sacred of places under Fourth Amendment jurisprudence. To repeat, the Fourth Amendment draws "a firm line at the entrance to the house". *Payton*, 445 U.S. at 589. *Caballes*, on the other hand, does not involve a house, but rather a vehicle lawfully stopped by law enforcement while traveling along a public interstate highway. 125 S.Ct. at 836. Throughout the history of the Fourth Amendment, vehicles on public roads have not been granted the deference afforded to houses for several reasons: The ready mobility of vehicles, the fact that the interiors of vehicles are generally in plain view of

> those passing by, and the reality of "pervasive regulation" of vehicles by government, all of which result in a decreased expectation of privacy. *See, California v. Carney*, 471 U.S. 386, 390-392, 105 S.Ct. 2066, 85 L. Ed.2d 406 (1985). The case on which *Cabailes* principally relies, *United States v. Place*, 462 U.S. 696, 103 S.Ct. 2637, 77 L. Ed.2d 110 (1983), also does not involve a house. Rather, it involves luggage in an airport, another public place. *Place*, 462 U.S. at 699. Without doubt any protection of luggage in such a public location has been eroded to nearly the point of non-existence in a post-9/11 world. The individual's expectation of privacy could not be more minimal in today's airports with their screenings, passenger scans, and pat-down searches." *State v. Rabb*, supra. (A-71, 72)

The gravamen of the Petitioner's argument is, that since illegal drugs were the subject matter of the police dog's quest, it was irrelevant where the quest took the dog – even at the front door of a private residence. According to the Petitioner, one just does not have, or cannot have, a reasonable recognized expectation of privacy in a home sheltering contraband.

This argument is too simplistic, and ignores the fact that the protection of a home from unreasonable "searches" and "seizures" is a core value of the Fourth Amendment. *See*, *Payton v. New York, supra.* The Fourth District Court of Appeal did not, as Petitioner asserts, misread the rationale behind *United States v. Place, supra*, *United States v. Jacobsen, supra,* and *Illinois v. Caballes, supra*. Rather, it is suggested, the Fourth District correctly read cases such as *Kyllo v. United States, supra, Payton v. New York, supra*, and *Silverman v. United States, supra*, and that it is the Petitioner who is misreading these cases.

The Fourth District Court of Appeal's approach and analysis was correct, and its reasoning was sound:

> " . . . the use of the dog, like the use of a thermal imager, allowed law enforcement to intrude into the constitutionally protected area of Rabb's house, and such reasonably could be considered a search violative of Rabb's expectation of privacy in his retreat. Likewise, it is of no importance that a dog sniff provides limited information, because as in *Kyllo*, the quality or quantity of information obtained through the search is not the feared injury. Rather, it is the fact that law enforcement endeavored to obtain the information at all, or in this case, the fact that a dog's sense of smell crossed the 'firm line' of Fourth Amendment protection at the door of Rabb's house. Because the smell of marijuana had its source in Rabb's house, it was an 'intimate detail' of that house – no less than the relative warmth of Kyllo's house." *Rabb, supra* at 592. (A-61)

CONCLUSION

FOR THE REASONS SUGGESTED ABOVE THE WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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